

APPEAL NO. 043172
FILED FEBRUARY 2, 2005

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on December 2, 2004. The hearing officer determined that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the 10th quarter but is not entitled to SIBs for the 11th quarter. The determination of nonentitlement to SIBs for the 11th quarter has not been appealed and has become final pursuant to Section 410.169.

The appellant (carrier) appeals the determination of entitlement to SIBs for the 10th quarter on the ground that the claimant had not made a good faith effort to seek employment (commensurate with the claimant's ability to work). The file does not contain a response from the claimant.

DECISION

Reversed and a new decision rendered.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). The requirement of eligibility for SIBs at issue is whether the claimant has made a good faith effort to obtain employment commensurate with his ability to work pursuant to Section 408.142(a)(4) and Rule 130.102(b)(2).

The parties stipulated that the claimant sustained a compensable (low back and right knee) injury on _____, and that the qualifying period for the 10th quarter was from February 8 through May 9, 2002. The claimant did have right knee surgery on March 13, 2002, however, the Texas Workers' Compensation Commission appointed (Dr. S) to provide an opinion whether the March 13, 2002, right knee surgery was "as a result of the compensable injury of _____[.]" In a report dated May 7, 2003, Dr. S responded that the 2002 surgery to repair the tears was not due to the compensable injury because prior operative reports of 1997 show "no evidence for those abnormalities at that time."

The claimant seeks to show that he made a good faith effort to obtain employment commensurate with his ability to work because he had a total inability to work. Rule 130.102(d)(4) provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work. The hearing officer found that the claimant "was incapable of performing any work, produced a narrative medical report explaining why he was unable to work and no credible medical evidence showed he was able to work." (Dr. J), the treating doctor, in

a report dated May 14, 2002 (just after the qualifying period), references the March 13, 2002, surgery, comments that the claimant “at this time” is enrolled in a rehabilitation program, and concludes that the claimant “is unable to work due to the persistent pain in the right knee with swelling as well as weakness of the right lower extremity.” Dr. J then goes on to state that in her opinion the claimant qualifies for SIBs for the 10th quarter. Dr. J does not give any indication whether the claimant could work part time with restrictions or in a sitting position. It is problematic whether Dr. J’s report qualifies as a narrative “which specifically explains how the injury causes a total inability to work.”

However, more importantly, (Dr. N) was appointed as a designated doctor to assess whether the claimant’s condition would allow him to return to work. Dr. N examined the claimant on or about July 25, 2002 (there is no contention that Dr. N’s reports have presumptive weight pursuant to Section 408.151 and Rule 130.110, but his reports do constitute other records), and in a report of that date requested a functional capacity evaluation (FCE). The FCE was performed (and is in evidence) and Dr. N in an “addendum to Designated Doctor’s Evaluation: July 25, 2002” commented that the claimant “qualifies for the light work category within the restricted plane” and could work doing light duty sedentary work with certain lifting restrictions. In addition, (Dr. A), apparently a required medical examination doctor, in a report dated February 18, 2002 (just after the beginning of the qualifying period), stated that there was no orthopedic reason related to the compensable injury which would have prevented the claimant from returning to work without restrictions on June 5, 1997.

The hearing officer in her decision mentions the FCE and Dr. A’s report but gives no reason why she did not think they were credible. The Appeals Panel has held that in cases where a total inability to work is asserted and there are other records which on their face appear to show an ability to work, the hearing officer is not at liberty to simply reject the records as not credible without explanation or support in the record. Texas Workers’ Compensation Commission Appeal No. 020041-s, decided February 28, 2002. The hearing officer acknowledged that there were some other records in evidence that purported to show that the claimant had an ability to work but offered no explanation supported by the evidence why they were not credible. The evidence does not support the determination that the claimant met the requirement of a good faith effort to obtain employment commensurate with the claimant’s ability to work by complying with Rule 130.102(d)(4).

Accordingly, we reverse the hearing officer's determination that the claimant is entitled to SIBs for the 10th quarter as being against the great weight and preponderance of the evidence (Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986)) and render a new decision that the claimant is not entitled to SIBs for the 10th quarter.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**MR. RUSSELL RAY OLIVER, PRESIDENT
221 WEST 6TH STREET, SUITE 300
AUSTIN, TEXAS 78701-3403.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Margaret L. Turner
Appeals Judge